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COUNTERSTATEMENT OF THE CASE

This controversy arises out of the refusal of Alaska's executive branch to deal with Alaska Native villages as "Indian tribes" rather than racially-defined groups. In 1980 the Alaska Legislature, in recognition of the *tribal* status of Native villages, enacted a revenue-sharing statute providing for annual payments of $25,000 to each "Native village government" located in a community without a state-chartered municipal corporation. The term "Native village government" was defined to include tribes organized under the 1934 Indian Reorganization Act (25 U.S.C. § 476) ("IRA"), "traditional village council[s]," "paramount chief[s]," or other governing bodies of the villages listed in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601, *et seq.* ("ANCSA"). ALASKA STAT. § 29.89.050 (1984) (reproduced in Petitioner's Brief at 2-3 n.2). Respondents Noatak and Circle fell within the class of tribal governments benefited by the Legislature.[1]

In opinions issued in 1981 (J.A. 20-34), the Alaska Attorney General asserted that such Native village governments are not federally recognized Indian tribes, but rather "racially exclusive group[s]" or "racially exclusive organization[s]" whose status turns solely "upon the racial ancestry of the communities." J.A. 24, 25, 28, 30. In reliance on this characterization, the Attorney General informed the Commissioner of Community and Regional Affairs (petitioner) that providing state aid to village governments violated equal protection guarantees and various provisions

[1] The Native Village of Noatak is a remote Inupiat Eskimo village of some 273 people (94.9% Native) located in Northwest Alaska above the Arctic Circle, along the Noatak River inland from Kotzebue Sound and the Chukchi Sea. It has a government reorganized under the IRA. Noatak's tribal constitution under the IRA was approved by the Secretary of the Interior on December 28, 1939. Respondent Circle Village, which is filing its own brief, has a traditional council form of government. Both governments are situated in villages which are not incorporated as state-chartered municipalities, and both villages are named in section 11(b)(1) of ANCSA as beneficiaries of the settlement of Native land claims. 43 U.S.C. § 1610(b)(1).

of the Alaska Constitution. Petitioner acted on the Attorney General's advice and expanded the program to include unincorporated communities that did not have tribal governments. As a result, the Native village governments' pro-rata shares of the fund appropriated by the Legislature were reduced.[2]

Respondent and two other Native villages brought this action in September 1985 to challenge the State executive branch's treatment of their tribal governments as racial groups and its rejection of their federally recognized status as political bodies. The villages sought declaratory and injunctive relief, together with an order requiring the Commissioner to pay them and all similarly affected village governments the money they would have received but for the administrative expansion of the program.[3]

District Judge Holland granted the villages a preliminary injunction to preserve sufficient fiscal year 1986 revenue-sharing funds (the last year of funding under the 1980 statute before it was legislatively amended to conform to the opinion of the Attorney General)[4] to make up for the

[2] The Commissioner has contended throughout the litigation, as he does here (Pet. Br. at 3-4), that no village suffered as a result of his decision to administratively expand the program because the Legislature funded the expanded program as fully as it would have funded the program had it been confined to Native village governments. Respondent alleges, however, that its entitlements were diminished by the Commissioner's action. The courts below did not deal with this issue, which goes to the merits of respondent's claims.

[3] Although the complaint prayed for class-wide retroactive relief (approximately 50 villages were in the purported class), the motion for class certification was denied after the State volunteered to treat all similarly situated villages in accordance with any judgment that might be rendered. *See Order Granting Preliminary Injunction*, App. at 14a, to Brief in Opposition to Certiorari. The maximum Noatak could recover for the shortfalls during 1983-1986 is $13,140.15. *See id.* at 17a and 19a. Petitioner is voluntarily holding $611 as the amount which the State calculates Noatak would be due for fiscal year 1986 should Noatak prevail in this action. *See id.* at 24a.

[4] In 1985, the Legislature amended the revenue-sharing statute (effective commencing with the 1987 State fiscal year) to conform to petitioner's

dilution in funding. App. A to Brief in Opposition to Certiorari, at 1a-16a. The court noted that "the State has consistently characterized the 'Native village government' rubric as being a racially tainted term. The court has substantial doubts that this characterization is appropriate." *Id.* at 12a. Ultimately, however, the court (per Judge Kleinfeld, to whom the case was reassigned) dismissed the entire case on alternative jurisdictional grounds: (1) the State's immunity from suit under the Eleventh Amendment, which has not been overcome by 28 U.S.C. § 1362; (2) the complaint's failure to present federal questions sufficiently substantial to invoke the subject matter jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1362.[5] Pet. App. at A5-A14. Even the villages' Fourteenth Amendment equal protection claim, which the court acknowledged to be "the hardest" (*id.* at A11), was "patently without merit." *Id.* at A12. The court found it unnecessary to decide whether, within the meaning of 28 U.S.C. § 1362, respondents Noatak and Circle Village are Indian tribes or bands with governments duly recognized by the Secretary of the Interior. *Id.* at A8 ("That question is a close one").

The Ninth Circuit reversed the district court's jurisdictional rulings. In its initial opinion in March 1989, 872 F.2d 1384, the court held that Noatak and Circle Village are duly recognized Indian tribes under 28 U.S.C. § 1362 (J.A. 71-73); that, assuming the Eleventh Amendment's applica-

administrative expansion of the program, thus statutorily providing aid to all unincorporated communities regardless of the presence of a Native village government. ALASKA STAT. § 29.60.140 (1986). Respondents have never claimed that Alaska has any legal duty to aid federally recognized tribes (*see* Pet. App. at A12), only that if as a matter of policy it chooses to do so, such aid may not be denied on the basis of race, nor on the ground that tribes are not political bodies under federal law; and that any contrary state policy or law which denies their political status and classifies them by race must fall.

[5] In addition to general federal-question (§ 1331) and Indian-tribe (§ 1362) jurisdiction, the complaint also alleges civil-rights jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. J.A. 4. The courts below have confined their jurisdictional analyses to §§ 1331 and 1362, and we do likewise here.

bility to suits by Indian tribes (J.A. 70-71), Congress has abrogated the states' immunity by the 1966 enactment of § 1362 (J.A. 73-77); and that the villages' federal claims are substantial ones, thereby conferring subject-matter jurisdiction. J.A. 77-78. Judge Kozinski dissented solely with respect to the "substantiality" issue. J.A. 79-83. In its amended opinion filed in February 1990, 896 F.2d 1157 (denying rehearing and rehearing *en banc*), the court, relying on intervening decisions of this Court, held the Amendment simply inapplicable to suits by Indian tribes. Pet. App. at B12-B20. Judge Kozinski continued to dissent on the issue of the substantiality of the villages' federal claims. Pet. App. at B22-B27.

This Court granted review of the three issues presented by petitioner: (1) whether the Eleventh Amendment bars suits against states brought by Indian tribes; (2) whether respondents are Indian tribes for the jurisdictional purposes of § 1362; and (3) whether any substantial federal question has been presented. Petitioner has now abandoned the third issue (*see* p. 6, *infra*), and has partially reversed his position on the second issue by conceding that respondent Noatak is indeed a tribe, though not "duly recognized" within the purview of § 1362. *See* p. 11, *infra*.

SUMMARY OF ARGUMENT

1. Respondent's complaint raises substantial federal questions conferring subject-matter jurisdiction upon the district court. To be satisfied with this proposition, the Court need look no further than (1) respondent's claim to be a federally recognized Indian tribe which federal law forbids the State to treat as a racially-defined non-sovereign group, and (2) the claim under the Fourteenth Amendment that petitioner has denied the Tribes equal protection of the laws by depriving them of State benefits on the basis of the race of their members. These claims are neither patently without merit nor obviously foreclosed by precedent; on the contrary, they find substantial support in the decisions of this Court.

2. The issue of Noatak's status as a "duly recognized" Indian tribe authorized to invoke federal-court jurisdiction under 28 U.S.C. § 1362 is easy. Petitioner now concedes that Noatak is a tribe, leaving the Court to ask only whether the Tribe has been duly recognized by the Secretary of the Interior. Manifestly, it has. First, Noatak was recognized over a half-century ago when the Secretary approved its self-governing constitution under the Indian Reorganization Act. That recognition has never been revoked. Second, the Tribe, along with Circle Village, is currently on the Secretary's published lists of tribes eligible for federal protection, services and programs "available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes." 25 C.F.R. § 83.2. Aside from these explicit acts of Secretarial recognition, Congress has recognized Noatak and Circle as tribes, leaving the Secretary without discretion in the matter, as the court of appeals correctly held. Pet. App. at B9.

3.(a) The Eleventh Amendment is aimed at suits against states by individuals and "private parties." Indian tribes, always viewed and treated under the constitutional plan as "domestic dependent nations," therefore do not fall within the scope of the Amendment's intended coverage. Nor do tribes come within the reasons for the Court's single extension of Eleventh Amendment immunity to bar suits by non-private parties, namely, foreign states. In the Constitution, the states plainly surrendered their immunity from suit by the United States on behalf of tribes, and the states otherwise surrendered to the Nation all of their sovereign authority over Indian affairs and relations. Suits by Indian tribes against states are thus "inherent in the plan of the convention."

(b) In the alternative, 28 U.S.C. § 1362 authorizes tribes to sue states. The statute has been so construed by this Court, and that determination satisfies the Court's "clear statement" requirement for congressional overrides of the Eleventh Amendment. Even if the Court's authoritative construction of § 1362 were deemed inadequate under the "clear statement" rule, the rule is inapplicable to the unique

circumstances of § 1362, enacted in 1966 under the standards of *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), which establishes the "contemporary legal context" for assessing the statute's effect on Eleventh Amendment immunity. More fundamentally, neither the Eleventh Amendment nor its "clear statement" rule applies to this special situation of a trust relationship between tribes and the United States, in which the national government can and does sue states on behalf of tribes. The "fundamental balance" of federal/state relations, which sovereign immunity and the "clear statement" rule are designed to serve, is not disturbed by a congressional delegation to tribes to invoke the same degree of federal judicial power against the states as the United States already exercises in its capacity as tribal trustee. The reason for state immunity and the "clear statement" rule is therefore absent, and § 1362 must be given its ordinary operative effect.

ARGUMENT

I. RESPONDENT'S CLAIMS ARISE UNDER FEDERAL LAW AND PRESENT SUBSTANTIAL FEDERAL QUESTIONS

Although petitioner has abandoned his challenge to the substantiality of the federal questions asserted by respondent, Pet. Br. at 6 n.8, we briefly address the issue at the outset (should the Court choose not to ignore it) because it is a threshold question of subject-matter jurisdiction.[6]

[6] The Eleventh Amendment defense, which petitioner has *not* abandoned in his briefing, also has a jurisdictional dimension, in that it "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 677 (1974). But unlike a defect in subject-matter jurisdiction, the defense of state sovereign immunity may be waived by express consent to suit, *e.g.*, *Port Authority Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868 (1990), and the federal courts are not required to raise the issue *sua sponte*—indeed, the defense may be withheld or invoked at the will of the State. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 515-16 n.19 (1982). Under the Court's precedents, therefore, it appears that federal subject-matter jurisdiction must be established before the Eleventh Amendment issue can be resolved. *See also* Pet. App. at B22 (Kozinski, J., dissenting).

Only if an action is "wholly insubstantial and frivolous," *Bell v. Hood*, 327 U.S. 678, 682-683 (1946), may the district court decline jurisdiction over a claim that arises under federal law. *See also Hagans v. Lavine*, 415 U.S. 528, 538 (1974). The court does not lack jurisdiction if it is merely skeptical of whether a claim is one upon which relief may be granted. Dismissal for failure to state a claim is action on the merits, as this Court long ago explained:

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

Bell v. Hood, 327 U.S. at 682. The court of appeals correctly held that respondents' federal claims are neither obviously frivolous nor foreclosed by prior caselaw so as to justify dismissal for lack of subject-matter jurisdiction. *Hagans v. Lavine*, 415 U.S. 528 (1974). We briefly illustrate the correctness of that judgment by summarizing the theory of respondent's tribal-status and equal-protection claims.

The claim that respondents were unconstitutionally denied benefits provided to "Native village governments" by the Alaska Legislature as a result of the view of petitioner and the State Attorney General that Noatak and Circle are not tribal governments, but "racially exclusive organizations," raises significant equal-protection as well as federal common-law issues.[7] "Paradoxical as it is," as Judge Noonan

[7] Even without the equal-protection claim, the villages' claim that they are in fact "federally recognized Indian tribes" entitled to treatment as political entities under federal law presents a federal question. A federal question is presented if vindication of a right or benefit under state law turns upon the construction and application of federal law. *See Franchise*

wrote for the majority below, "the allegation that the move from a tribal basis to a non-tribal basis for the [revenue-sharing] bonus was racially discriminatory is an intelligible claim. Any governmental action based on the racial character of those affected is presumptively invalid." Pet. App. B21.

The Constitution expressly singles out Native tribes for special consideration and implicitly authorizes their discrete treatment by both the state and federal governments. *See New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1859); *see also Oneida I*, 414 U.S. at 672 n.7; F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 658-59 (1982 ed.) [hereafter, "COHEN"]. While the parameters of state-tribal relations in the context of attempted *beneficial* treatment of tribes have seldom been litigated, every court that has considered the matter has upheld beneficial state action,[8] and "[s]uch state laws have long been assumed valid." COHEN at 659.

The Court has frequently held that federally recognized Indian tribes have a unique political status and therefore may be accorded special beneficial treatment under the Constitution.

> Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians . . . If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the government toward the Indians would be jeopardized.

Morton v. Mancari, 417 U.S. 535, 552 (1974), *quoted in Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976); *accord, United States v. Antelope*, 430 U.S. 641 (1977).

The Alaska Legislature, acting in accordance with this long line of precedent, chose to provide benefits to Native tribes as independent, self-governing members of the body politic.[9] Petitioner, however, has rejected the political status of Alaska Native tribes under federal law and instead classified them as racial groups which the State is barred from giving special consideration. Respondent's challenge to that state action is not a frivolous claim, nor is it one which has been foreclosed by prior holdings.[10]

That race was a primary factor which caused petitioner to conclude that State aid to tribes is prohibited is demonstrated by the Attorney General's opinions whose entire

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Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983); *Smith v. Kansas City Title and Trust Co.*, 255 U.S. 180 (1921). Moreover, questions of tribal rights and powers are inherently questions of federal law. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*); *National Farmers Union Ins. Co.* v. Crow Tribe, 471 U.S. 845 (1985).

[8] *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir.), *cert. denied*, 444 U.S. 870 (1979); *St. Paul Intertribal Housing Board v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983); *Peyote Way Church of God v. Smith*, 556 F. Supp. 632, 638-639 (N.D. Texas 1983); *State v. Forge*, 262 N.W.2d 341 (Minn. 1977).

[9] Indeed, the Revenue Sharing Act recognizes the tribal status of all Native villages organized under the IRA or listed in ANCSA (precisely the same conclusion reached by the court below). The Alaska Legislature's action was typical of that taken by many states with Indian tribes within their borders. *See* COHEN, *supra*, at 658 n.47.

[10] *See, e.g., Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson*, 571 P.2d 1373, 1375 (Wash. 1977) *rev'd sub. nom., Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 692-95 (1979) (Washington's refusal to regulate its fisheries in such a way as to accomodate Indian treaty fishing rights could not "survive the command of the Supremacy Clause" *Id.* at 695;) *Fisher v. District Court*, 424 U.S. 382 (1976) (in sustaining a lower court decision holding that tribal courts have exclusive jurisdiction over Indian adoptions the Court rejected the claim of the would-be adoptive parents that the Court had deprived them of equal protection under the Montana Constitution by denying the Montana courts jurisdiction over Indian adoptions). Since the Alaska Revenue Sharing Act implemented the overriding federal policy of encouraging tribal self-government, any conflicting provision of the Alaska Constitution, including its equal protection clause —if construed as precluding such treatment—must fall under the weight of the Supremacy Clause.

analysis is premised upon classifying Alaska tribes as "racially exclusive group[s]" or "racially exclusive organization[s]"—and rejecting their status as recognized tribal governments. J.A. 21, 25, 28, 30. Thus, petitioner acted contrary to this Court's determination in *United States v. Mazurie*, 419 U.S. 544 (1975), that Indian tribes are unique sovereigns, not mere private voluntary organizations.[11]

This is a classic example of the racial discrimination under color of state law proscribed by the Fourteenth Amendment. Moreover, it also contravenes the Indian Commerce Clause (Art. I, § 8, cl. 3) and federal Indian common law which not only authorize separate treatment for Native tribes, but pre-empt state laws purporting to bar such treatment. Had petitioner correctly classified tribes as political bodies, which is not a suspect class, the Legislature's action would easily have satisfied the rational relation test and the tribes would have received their full shares. *See Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463 (1978). Instead, petitioner classified respondent Tribes by the racial ancestry of their members, thus creating a racial classification where none existed, and based on that suspect classification denied the Tribes their full share of statutory benefits. What the Legislature gave the tribes by reason of their political status, the petitioner took away by reason of their race.

[11] *Amici* States attempt to equate Alaska's expansion of its revenue sharing program to "no more than a modification of an affirmative action program like that upheld in *Crawford v. Los Angeles Board of Education*, 458 U.S. 527 (1982)." *Amici Brief of Alabama et. al.*, at 40-41. The States' premise is wrong. The Alaska revenue-sharing program was not a "race-related" "affirmative action program," but a "politically related" revenue-sharing program between the State and tribal governments. Thus, unlike *Crawford*, it was the Commissioner's revision of this program—not the original Act—which was based on race. The dissenting judge below, like Alabama, *et al.*, thus erred in claiming that the State was merely treating Natives and non-Natives similarly. Pet. App. at B25. The claim is that the Legislature treated the Native villages differently based on their political status—not based on their members' race. Petitioner, on the other hand, diluted the benefits provided by the Legislature due to his view (adopted from the Attorney General) that the villages are mere racial groups.

The Tribes' federal claims are substantial and the district court was therefore obliged to exercise its jurisdiction on the merits.

II. RESPONDENTS ARE "DULY RECOGNIZED" INDIAN TRIBES FOR PURPOSES OF SUIT UNDER 28 U.S.C. § 1362

The substantial federal questions raised by respondents establish the subject-matter jurisdiction of the district court under the general federal-question jurisdictional statute, 28 U.S.C. § 1331,[12] and also satisfy the practically identical federal-question requirement of the Indian-tribe jurisdictional statute, 28 U.S.C. § 1362.[13] Petitioner does not challenge respondent Noatak's right to sue pursuant to § 1331, but he does deny that either Noatak or Circle is a "duly recognized" tribe for § 1362 purposes. The issue is easily resolved.

Resolution of the issue of respondent Noatak's capacity to invoke § 1362 is made especially easy by petitioner's concession here, completely reversing his position below, that "[t]he State of Alaska believes that the Native Village of Noatak is a tribe." Pet. Br. 8; *see also id.* at 29 (the State "believes that the Native Village of Noatak would meet all the criteria in federal law for recognition as a tribe").[14] For purposes of the narrow jurisdictional issue

[12] "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

[13] "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

[14] In his answer to respondents' complaint in the district court, petitioner denied that Noatak "is a government" (J.A. 36), and throughout the proceedings in both the trial court and the Ninth Circuit petitioner steadfastly disputed Noatak's status as a federally recognized Indian tribe. Petitioner's position began to shift in his petition for certiorari, however, when he stated that "the state believes that Noatak *may qualify* as a tribe under federal law for certain purposes." Pet. 12 (emphasis added). The shift is now complete, but petitioner has given no indication that

before the Court, therefore, it must be taken as established that Noatak is a tribe. The only remaining question, which petitioner apparently does not concede, is whether Noatak has been "duly recognized" by the Secretary within the contemplation of § 1362. It plainly has been, as has Circle Village.

A. The Secretary Officially Recognized Noatak Over Fifty Years Ago Pursuant To The Indian Reorganization Act

Pursuant to the Indian Reorganization Act (IRA) of 1934, as amended, 25 U.S.C. §§ 476 *et seq.*, the Secretary has recognized over 70 Alaska Native villages, including Noatak. That Act enabled tribes in Alaska and elsewhere, if they so chose, to reorganize their existing governments or to form new governments. *Id.*, § 479. As initially enacted in 1934, however, the Act defined "tribe" as "any Indian tribe, organized band, pueblo or the Indians residing on one reservation." *Id.*[15] With few exceptions, Alaska Native villages were not located on reservations and were "not grouped easily into bands or tribes." COHEN, *supra*, at 751; H.R. REP. No. 2244, 74th Cong., 2d. Sess. 1-2 (1936). Thus, most villages could not take advantage of the IRA.

To remedy this defect (without going through the intermediate step of setting up some 200 reservations), Congress amended the Act in 1936 to extend its benefits to Alaska's non-reservation Native communities. 25 U.S.C. § 473a. The

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he has altered his view that respondent must still be dealt with as a racially-defined group. (Petitioner does continue to dispute Circle Village's tribal status, but as we demonstrate, Circle has also been "duly recognized" within the meaning of § 1362.)

[15] Thus, under the 1934 Act, Indians on reservations could organize and become tribes under the IRA whether or not they were historical tribes. This conclusion was expressly confirmed by Felix Cohen: "where . . . the Indians of a given reservation organize and adopt a constitution under sec[tion] 16 . . . *they thereby become a tribe.*" F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 270-71, n.22 (1942 ed.)(emphasis added). *See also* Solicitor's Opinion, April 15, 1936, 1 *Op. Sol. on Indian Affairs* 618 (U.S.D.I. n.d.); Solicitor's Opinion, January 29, 1941, 1 *Op. Sol. on Indian* Affairs, 1026, 1027 (U.S.D.I. n.d.).

amendment removed the requirement that "tribes" or "Indians" live on a reservation and instead authorized Alaska Natives "having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district" to organize under the Act. *Id.* § 473a.[16] Thus, under the 1936 amendment Alaska Natives became eligible to organize under the IRA whether or not they had reservations.

On December 28, 1939, Noatak's constitution and by-laws were approved by the Secretary pursuant to § 16 of the IRA, 25 U.S.C. § 476. Pet. Br. at 4-5. According to Interior regulations, an IRA constitution is the "written organizational framework of any tribe reorganized pursuant to [the Act] *for the exercise of governmental powers.*" 25 C.F.R. § 81.1(g) (emphasis added). It would seem self-evident that Secretarial approval of Noatak's constitution constitutes "due recognition" for purposes of suing under § 1362. But the State, while admitting that Secretarial approval of IRA constitutions for lower-48 tribes is sufficient recognition, denies that such approval has the same effect in Alaska. This anomalous result is defended with the argument that in the lower 48 states only "tribes" are eligible to organize under the 1934 Act, whereas under the Alaska Amendment non-tribal groups may also organize. Pet. Br. at 30-33. The State has simply misread the 1934 Act. Both it and the 1936 amendment authorize the organization of groups of Indians which were not historical tribes. *See* 25 U.S.C. § 479, and notes 18-20, *infra*.

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[16] Though somewhat inartful, this language sufficiently described the small village-based tribes in Alaska with which Congress was less familiar than the larger tribes on "lower 48" reservations. The 1936 amendment removed the technical "reservation" obstacle and allowed Alaska Native villages to "participate in the benefits of existing law to the same extent and manner as the Indians of the United States proper." H.R. REP. No. 2244, 74th Cong., 2d. Sess. 3 (1936); S. REP. No. 1748, 74th Cong., 2d. Sess. 3 (1936). The House Report (at 1-2) noted: "Many groups that would otherwise be termed 'tribes' live in villages which are the bases of their organizations." *See also* Smith & Kancewick, *The Tribal Status of Alaska Natives*, 61 COLORADO L. REV. 455, 496-98 (1990).

The State's insistence that the federal government cannot recognize a Native group that was not an historical tribe (Pet. Br. at 32, 33) is demonstrably wrong. Although the evidence overwhelmingly confirms that Alaska Native villages are historical tribes,[17] historical tribal status has never been a prerequisite to federal recognition. Congress has repeatedly recognized non-historical Native groups as Indian tribes. It has on numerous occasions created, consolidated and confederated tribal governing bodies of several ethnological tribes, sometimes even speaking different languages.[18] Even "where no formal Indian political organization existed, scattered communities were sometimes united into tribes." COHEN, *supra*, at 6.[19] On the other hand, larger tribes have often been broken down into smaller units with each sub-group being recognized as a separate "tribe."[20] In short, so long as it is a "distinctly Indian communit[y]," *United States v. Sandoval*, 231 U.S. 28, 46 (1913), a tribe is what the political branches say it is.[21]

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[17] *See* FEDERAL FIELD COMMITTEE FOR DEVELOPMENT PLANNING IN ALASKA, ALASKA NATIVES AND THE LAND (G.P.O. 1968); and *Amici* Brief of the Native Village of Tanana, et al. [hereafter, "Tribes' Amici Br."]; and Smith & Kancewick, n.16, *supra*, at 482-496.

[18] Indeed, the tribal entity in the leading case interpreting § 1362, *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 466 (1976), is not an historical tribe at all, but a consolidation of Flathead, Kootnay, and Upper Pend d'Oreilles Indians settled on the Flathead Reservation by the 1859 Treaty of Hell Gate. "These and many other consolidated or confederated groups have been treated politically as single tribes." COHEN, *supra*, at 6.

[19] In *United States v. McGowan*, 302 U.S. 535 (1938), for example, this Court unanimously ruled that the non-historical Reno Indian Colony was a dependent Indian community and thus had tribal status. The colony was composed of several hundred non-reservation Indians scattered across Nevada, whom the government had settled on 28 acres near Reno.

[20] The Sioux and Chippewas are examples. *See* Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 (dividing great reservation of Sioux into seven separate reservations); Memo Sol. Int., Feb. 8, 1937 (Mole Lake Band of Chippewas), 1 Op. Sol. On Indian Affairs 724-25 (U.S.D.I. n.d.).

[21] This Court concluded early on that when either the Congress or the Executive has recognized a tribe the judiciary must defer to its judgment:

As is plain from the face of the matter, the Secretary's approval of Noatak's IRA government establishes that it is a "duly recognized" tribe within the literal terms of § 1362.

B. Noatak and Circle Both Appear On The Secretary's Published Lists Of Recognized Tribes.

The Secretary has also duly recognized the respondents' tribal status (and that of 200 other Alaska Native villages) in Federal Register lists of recognized tribes. In 1978, the Department of the Interior issued regulations requiring the Secretary to annually publish an official "list" acknowledging the existence "of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs." 25 C.F.R § 83.6(b). Such acknowledgment of tribal existence is a "prerequisite" to the "protection," "services, and ben-

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> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and the other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1866). *Accord, Baker v. Carr*, 369 U.S. 186, 215-17 (1962). The courts have never deviated from this position. No congressional or executive determination of tribal status has ever been overturned by the judiciary. COHEN, *supra*, at 5. The only limitation on the authority of the political branches to recognize tribes is the rule against arbitrary action, that is, Congress may not take a group of non-Indians and arbitrarily call it a tribe. *United States v. Sandoval*, 231 U.S. at 46. *See also, e.g.*, 25 C.F.R. § 83.7(e) (tribes may be recognized by regulation if members are descendants of combined historical tribes).

Petitioner also claims that organization under the Alaska IRA cannot constitute federal recognition because under the Act an Indian can be a member of more than one tribe, whereas Interior's regulations for recognizing new tribes prohibit dual membership. Pet. Br. at 32. The claim is without merit. The regulations simply require that "[t]he membership of the petitioning group [be] composed *principally* of persons who are not members of another . . . tribe." 25 C.F.R. § 83.7(b). There is no absolute prohibition of dual membership. Furthermore, in the absence of affirmative federal law to the contrary, tribal membership is solely a matter of tribal law. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

efits from the Federal Government available to Indian tribes." 25 C.F.R. § 83.2.

> Such acknowledgement shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes . . . .

25 C.F.R. § 83.2. Inclusion on the list is recognition that the tribe has "a government to government relationship to the United States." 25 C.F.R. § 83.11.

Both Noatak and Circle are on all of the Secretary's lists of recognized tribes.[22] The State argues that these lists are not intended to recognize the tribal status of Alaska Native villages, but merely to identify those entities eligible for funds and services under congressional Indian programs. But that is not what the regulation says. It requires the Secretary to publish a "list of all tribes which are recognized *and* receiving services." 25 C.F.R. § 83.6(b).[23] Use of the conjunctive "and" obviously entails recognition as well as receipt of services.

The State argues against the effect of the Secretary's lists, purporting to find significance in the titles,[24] former

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[22] *See, e.g.*, 47 Fed. Reg. 53130, 53134 (Nov. 24, 1982); 48 Fed. Reg. 56862, 56865, 56866 (Dec. 23, 1983); 50 Fed. Reg. 6055 (Feb. 13, 1985); 51 Fed. Reg. 25115, 25118 (July 10, 1986); 53 Fed. Reg. 52829, 52834 (Dec. 29, 1988).

[23] Because the "acknowledgement of tribal existence by the Department is a *prerequisite* to . . . services and benefits from the federal government available to Indian tribes," 25 C.F.R. § 83.2 (emphasis added), an Indian group cannot receive "services and benefits" unless it has been "acknowledged" to be a *tribe*. Therefore, if a Native group receives such services and benefits it must have received such acknowledgment. *See* Smith & Kancewick, n.16, *supra*, 480-82.

[24] Organizationally, the Alaska villages are on a list entitled "Native Entities," separate from the list of the 300 lower 48 tribes which are titled "Tribal Entities." Lacking, however, is any text indicating the Secretary made two lists for purposes of legal differentiation rather than administrative convenience. The titles and section headings cannot limit the plain meaning of the text, *Railroad Trainmen v. Baltimore & Ohio*

preambles,[25] and the latest list's inclusion of Alaska Native corporations.[26] These arguments are unavailing for the reasons set forth in the margin.

Ry. Co., 331 U.S. 519, 528-29 (1947). The two lists were assembled at different points; the initial lower-48 list publication of February 6, 1979 contained a promise that the list of eligible Alaska entities would be published at a later date. *See* 44 Fed. Reg. 7235 (Feb. 6, 1979). The different titles merely reflect the fact that most Alaska tribes are called "villages" or "communities," whereas most tribes in the lower 48 are called "tribes." In fact, the text confirms the Secretary's intention that Alaska villages be accorded the same status as tribes elsewhere: the footnote to the lists defines "Indian Tribal Entities" to include "Indian Tribes, Bands, Villages, Communities and Pueblos as well as Eskimos and Aleuts." *See e.g.*, 51 Fed. Reg. 25115. A tribe by any other name is still a tribe. *See* Respondent Circle's Brief.

[25] The State has argued that language in the preamble to the 1982 Alaska list is inconsistent with tribal recognition. *See* 47 Fed. Reg. 53133-34 (Nov. 24, 1982). The argument is that the preamble's reference to the eligibility of "additional entities in Alaska which are not historical tribes" refers to the 200 Native villages on the list. These words, however, clearly refer to Native corporations created under ANCSA, not the listed villages. The remainder of the preamble makes it clear that the concern was over the Native corporations which had been designated as "tribes" in the Indian Self-Determination Act, solely to render them eligible to contract for the provision of funding and services to Native village tribes and their members. *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471 (9th Cir. 1987). These corporations are the "non-historical tribes" referred to in the preamble and were deliberately excluded from the list in order to avoid the confusion that might arise from the publications of an "overlapping," multiple eligibility listing.

[26] More recently, Interior changed its approach and included the ANCSA corporations. The preamble to the 1988 list explains clearly that these corporations were added to reflect their statutory eligibility for funding and services under the Self-Determination Act, 53 Fed. Reg. at 52832, not as an acknowledgment of tribal status in the political sense. Notably, the preamble does not purport to rescind the Department's prior recognition of the villages included on the earlier lists and retained on the 1988 list. Since scope of any tribes' power can only be determined by reference to relevant treaties, statutes and common law, the preamble disclaims any intent to have the list construed to "determine . . . the extent of the powers and authority of . . . [the listed] entit[ies]"; but significantly, it does not disclaim an intent to acknowledge the tribal status of the listed villages.

As the court below held, if Congress has recognized a tribe, the Secretary is without discretion to withhold recognition. Pet. App. at B9. And it cannot seriously be doubted that ANCSA—which settled the aboriginal land claims of the Native villages in exchange for fee title to 44 million acres of land, nearly a billion dollars, and continued federal services and programs for which only "tribal Indians" are eligible—constitutes tribal recognition in the most fundamental sense imaginable. It is axiomatic that the only Native groups which may assert claims of aboriginal title are tribes. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). The Secretary has not only acted rationally in placing Noatak and Circle on his published lists; he was not free to do otherwise.[27]

Alaska Native villagers, for the most part, continue to occupy their aboriginal homelands and, like the Inupiat Eskimos of Noatak and the Athabascan Indians of Circle Village, they yet today hunt and fish on their ancestral hunting and fishing grounds. They are the least-dislocated, least-disbanded, least-assimilated of all the tribes in the United States. In accordance with the entire, albeit comparatively short, history of dealings between Alaska tribal villages and the United States, the Secretary has given them due recognition.[28] Like all "other federally recognized tribes with a government-to-government relationship to the United States," 25 C.F.R. § 83.11(a), they are authorized to bring federal-question suits in their own names in the federal district courts under 28 U.S.C. § 1362.

[27] *See* Briefs of Respondent Circle and *Amici* Tribes, which set forth numerous other congressional acts and executive actions which expressly recognize the tribal status of both Noatak and Circle.

[28] This history is capably set forth in detail in the Tribes' *Amici* Brief.

III. THE DOCTRINE OF ELEVENTH AMENDMENT SOVEREIGN IMMUNITY DOES NOT BAR RESPONDENTS' SUIT, IN WHOLE OR IN PART

A. Even If Otherwise Applicable, The Eleventh Amendment Does Not Foreclose Respondents' Request For Prospective Relief

The only defendant in this case is petitioner, Alaska's Commissioner of Community and Regional Affairs, who is sued in his official capacity only. Respondents' complaint seeks both prospective declaratory and injunctive relief, and retroactive money damages. J.A. 15-19. The prospective relief sought in this case is permissible even if the Eleventh Amendment is applicable to federal-question suits against States by federally recognized Indian tribes. In determining whether the Amendment forecloses particular remedies in such cases, the Court "look[s] to the substance rather than to the form of the relief sought, . . . and will be guided by the policies underlying the decision in *Ex parte Young*." *Papasan v. Allain*, 478 U.S. 265, 279 (1986). It continues to be settled law, under the rule of *Ex parte Young*, 209 U.S. 123 (1908), that the Amendment does not bar a suit against a state official in his official capacity for prospective declaratory and injunctive relief, " 'because official-capacity actions for prospective relief are not treated as actions against the State.' " *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2311 n.10 (1989), *quoting Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985).[29] The district court thus erred in dismissing respondents' claims for prospective relief on Eleventh Amendment grounds.

The district court held (Pet. App. A7), and petitioner argues (Pet. Br. 10 & n.11) that the case involves only "money damages but no prospective relief," because the

[29] *Accord, e.g., Papasan v. Allain*, 478 U.S. 265, 276-279, 281-282 (1986); *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102-03 (1984); *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Hutto v. Finney*, 437 U.S. 678, 690-93 (1978); *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977); *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974).

Legislature amended the program in 1985 to include communities without tribal governments. But this argument ignores the fact that the statute was amended as a result of, and to conform with, the persistent view of the Attorney General (adopted by the Commissioner) that the previous program was unconstitutional, because respondent tribes must be dealt with as "racially exclusive organizations" rather than as federally recognized Indian tribes. *See* pp. 1,2,9,10, *supra*.[30] The Legislature's adoption of the course of action followed by petitioner and the Attorney General thus incorporates, rather than eliminates, the very alleged unconstitutional policy that is the principal focus of respondents' complaint.

Respondents thus claim a continuing violation of federal law (a State policy abridging their federally protected status as tribes and treating them on racial rather than political grounds), for which prospective injunctive or declaratory relief can readily be fashioned.[31] Respondents' claim for such prospective relief, in order to be freed of the State executive policy of treating them as "racially exclusive groups" and to enable them to appeal to and deal with the Alaska Legislature as politically distinct Native tribes under federal law, is therefore entitled to an adjudication on the merits regardless of the availability of the damages remedy which they also seek. Such relief would merely "serve[ ] directly to bring an end to a present violation of federal law." *Papasan v. Allain*, 478 U.S. at 278.

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[30] As previously noted (p. 11, *supra*), the State now concedes that respondent Noatak is an Indian tribe. But the State has given no indication that it has abandoned its contention that the Legislature must continue to deal with tribes as "racially exclusive organizations."

[31] Such relief could include a declaratory judgment affirming respondents' status as federally recognized tribes, and an injunction prohibiting petitioner from treating respondents on racial grounds in the future. Alaska is of course free to eliminate revenue-sharing altogether, or to decline to provide special funding to Native village governments for any number of legitimate reasons, or for no reason at all, but not for an unconstitutional reason such as racial discrimination or denial of the federally guaranteed status of tribes.

Of course, if the Eleventh Amendment applies to suits by Indian tribes, respondent acknowledges that in the absence of an act of Congress its request for retroactive monetary relief for losses resulting from the expansion of the revenue-sharing program prior to this suit would be prohibited.[32] We show below, however, that the Eleventh Amendment does not bar respondent's prayer for damages.

B. The Amendment Does Not Apply To Suits By Indian Tribes

"[T]he significance of the Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution," *Welch v. Texas Dept. of Highways & Public Transport.*, 483 U.S. 468, 472 (1987) (plurality opinion), and *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985) (both quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 96 (1984)), and the Court "has drawn upon principles of sovereign immunity to construe the Amendment . . . ." *Port Authority Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868, 1872 (1990). "The contours of state sovereign immunity are determined by the structure and requirements of the federal system." *Welch*, 483 U.S. at 487. *See also Dellmuth v. Muth*, 109 S. Ct. 2397, 2400 (1989). Before analyzing the case at bar in light of those principles and considerations, however, it is necessary to address the half-hearted argument of the State and *amici*[33] that the Court has already settled the question.

1. The question is an open one

The argument that the question is foreclosed by precedent is based upon *United States v. Minnesota*, 270 U.S.

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[32] Except that prospective relief may yet be granted with respect to payment of the $611 which petitioner is holding for the benefit of respondent Noatak in the event Noatak prevails on the merits. *See* Pet. Br. 4 and n.6; n.3, *supra*. This money petitioner voluntarily withheld from the legislative appropriations for the revenue program, when he made his fiscal year 1986 disbursements to the villages.

[33] Pet. Br. 17; Alabama Br. 11-12; State Governments Br. 21 n.12.

181 (1926), and *Arizona v. California*, 460 U.S. 605 (1983). In *Minnesota*, an action brought by the United States on behalf of Indians to recover lands (or their value) from the State, the jurisdictional question presented was whether the United States properly could invoke the Court's original jurisdiction on behalf of the Indians. In the course of rejecting the State's argument that the United States was only a "nominal party" and "that the suit is essentially one brought by the Indians against the State" (270 U.S. at 193), the Court assumed the correctness of the State's contention that State sovereign immunity would have barred the action if it had been brought by the Indians. *Id.* at 194-95.[34]

The Court's discussion in *Minnesota* reflected only an *arguendo* assumption. *Cf. Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273, 2301 (1989) (Scalia, J., concurring in part

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[34] The Court said (270 U.S. at 194-95):

> Counsel for the state point out that the Indians could neither sue the state to enforce the right asserted in their behalf, nor sue the United States for a failure to call on the state to surrender the lands or their value, and from this they argue that the United States is under no duty and has no right to bring this suit. But the premise does not make for the conclusion. The reason the Indians could not bring the suits suggested lies in the general immunity of the state and of the United States from suit in the absence of consent. Of course, the immunity of the state is subject to the constitutional qualification that she may be sued in this court by the United States, a sister state, or a foreign state. *United States v. Texas* .... Otherwise, her immunity is like that of the United States. But immunity from suit does not reflect an absence of duty.

The Court's acceptance of the State's contention that "the Indians" could not sue the State is no more essential to the actual decision of the case than is the Court's assumption that the State could be sued by a foreign state—a proposition which the Court expressly rejected when it was directly presented eight years later in *Monaco v. Mississippi* (*see* note 46, *infra*). But even if the Court's statements in *Minnesota* are read to reflect an actual belief that the State's arguments were correct, and even if it is inferred that the references to "the Indians" encompassed tribes as well as individuals, this part of the decision plainly is "not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. at 671.

and dissenting in part). That is precisely how the Court treated it in *Arizona v. California*, 460 U.S. at 614, where the Court, citing *Minnesota*, held that, "[a]ssuming, *arguendo*, that a State may interpose its immunity to bar a suit brought against it by an Indian tribe," the Eleventh Amendment did not prevent the tribes there from intervening in an action brought against the states by the United States. The question was plainly regarded as open and it has remained open since.[35]

2. The relevant principles of state sovereign immunity and federalism

Whatever may be deduced about the "fundamental principle of sovereign immunity" as it was understood by the Framers, and as it has been understood and applied by the Court, a central and recurring theme is that its applicability is generally limited to suits by *individuals*—by "private citizens" and "private parties"—against sovereigns without consent. This is apparent from the views of Hamilton, Madison and Marshall upon which the Court has repeatedly relied and which the Court has often quoted—Hamilton, in THE FEDERALIST No. 81: "It is inherent in the nature of sovereignty not be amenable to the suit of an individual *without its consent*" (emphasis in original; underlining added), and "[t]he contracts between a nation and *individuals* are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force" (emphasis added); Madison, in the Virginia Convention: "It is not in

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[35] *See, e.g., Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (rejecting the clear assumption, if not actual holding, of Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), that a foreign state could sue a state); *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904) (rejecting the broad reliance of Justice Bradley's opinion in *Hans v. Louisiana*, 134 U.S. 1 (1890), upon the dissenting opinion in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)); *Hans v. Louisiana*, *supra*, 134 U.S. at 19-20 (rejecting Chief Justice Marshall's strong suggestion in *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264 (1821), that federal-question suits by individuals against states were not barred; *see also Welch*, 483 U.S. at 482 n.11 (plurality opinion) (Chief Justice Marshall's statements in *Cohens* "were unnecessary to the decision").

the power of *individuals* to call any state into court" (emphasis added); Marshall, in the Virginia Convention: "an *individual* cannot proceed to obtain judgment against a state, though he may be sued by a state" (emphasis added).[36] That the principle was aimed at actions by individuals against sovereigns was also the consistent view of the anti-Federalists.[37] And this object—to preclude suite by *individuals* against state—is echoed in the major decisions of this Court.[38] It recurs throughout the leading decision in *Hans*

[36] *Quoted in, e.g., Welch*, 483 U.S. at 480 n.10 (plurality opinion); *Edelman v. Jordan*, 415 U.S. at 660-61 n.9; *Monaco v. Mississippi*, 393 U.S. at 324-25 & 325 n.4; *Hans v. Louisiana*, 134 U.S. at 12-14; *see also Nevada v. Hall*, 440 U.S. 410, 419-20 (1979); *id.* at 436 (Rehnquist, J., dissenting); *Atascadero*, 473 U.S. at 265-77 Brennan, J., dissenting).

[37] For example, Patrick Henry objected to the prospect of money judgments being rendered against a state, "if, in a suit between a state and *individuals*, the state were cast"; the "Federal Farmer" complained that the state-citizen diversity clause of Article III would "so humble a state, as to bring it to an *individual* in a court of law"; and "Brutus" asserted that it was "improper" to "subject[ ] a state to answer in a court of law, to the suit of an *individual*," because "[t]his is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to" (emphases added), *quoted in Atascadero*, 473 U.S. at 266-73 (Brennan, J., dissenting). Also, the New York Convention, while ratifying the Constitution, declared its understanding that the federal judicial power would not "authorize any Suit by any *Person* against a State" (emphasis added), *quoted in Welch*, 483 U.S. at 483 (plurality opinion).

[38] *E.g., Pennsylvania v. Union Gas Co.*, 109 S. Ct. at 2297-98 (Scalia, J., concurring in part and dissenting in part) (emphasizing the constitutional protection of sovereigns from "*private suit*" and arguing that "[t]he inherent necessity of a tribunal for peaceful resolution of disputes between the Union and the individual States, and between the individual States themselves, is incomparably greater . . . than the need for a tribunal to resolve disputes on federal questions between *individuals* and the States" (emphases added)); *Quern v. Jordan*, 440 U.S. 332, 337 (1979) (Amendment bars "a suit in federal court by *private parties*" (emphasis added), *Alabama v. Pugh*, 438 U.S. 781 (1978) (*per curiam*) ("suits by *private parties* against States and their agencies" are prohibited (emphasis added)); *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184, 196 (1964) ("sovereign immunity" is "the principle that a State may not be sued by an *individual* without its consent" (emphasis added)); *id.* at 187, 192; *Ex parte New York, No. 1*, 256 U.S. 490, 497 (1921) ("the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by *private parties* against a State without consent given" (emphasis added), *quoted in Welch*, 483 U.S. at 489 (plurality opinion), and *Pennhurst*, 465 U.S. at 120); *Ex parte New York, supra*, 256 U.S. at 500 ("the immunity of a state from suit in personam in the admiralty, brought by a *private person*, is clear" (emphasis added)); *id.* at 502 (the case in effect involves "suits brought by *individuals* against the state of New York" (emphasis added)); *id.* at 503 ("the states . . . enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of *individuals*" (emphasis added)). *See also* State Governments Br. at 7-8.

v. Louisiana, and is an integral part of the Court's constitutional holding in that case.[39]

The private-suit distinction was underscored just two years after the decision in *Hans* when the Court held, in *United States v. Texas*, 143 U.S. 621 (1892), that the Amendment does not bar a suit by the United States against a state. Justice Harlan's opinion for the Court[40] cites *Hans* for the understanding that "the judicial power of the United States does not extend to suits of *individuals* against states," 143 U.S at 644 (emphasis in original), and describes *Hans* as having "proceeded upon the broad ground that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an *individual* without its consent.' " *Id.* at 645-46 (emphasis in original). The Court concluded that "the suability of one government by another government . . . . does no violence to the inherent nature of sovereignty." *Id.*

[39] *E.g.*, 134 U.S. at 11 (the Eleventh Amendment "did not in terms prohibit suits by *individuals* against the States, but declared that the Constitution should not be construed to import any power to aughorize the bringing of such suits"); *id.* at 12 (the Amendment was addressed to "this question of the suability of the States by *individuals*"); *id.* (federal judicial power "to entertain suits by *individuals* against the States had been expressly disclaimed, and even resented" by the proponents of the Constitution); *id.* at 15 ("The letter is appealed to now, as it was then, as a ground for sustaining a suit by an *individual* against a State"); *id.* at 21 ("the rule . . . exempts a sovereign State from prosecution in a court of justice at the suit of *individuals*") (emphasis added).

[40] Justice Harlan had specially concurred in the *Hans* "holding that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued." 134 U.S. at 21 (concurring opinion).

at 646.[41] Similarly, when the Court held twelve years later that the Amendment does not bar suits between sister states, it said: "it will be perceived that this amendment only granted to a state immunity from suit by an individual, and did not affect the jurisdiction over controversies between two or more states." *South Dakota v. North Carolina*, 192 U.S. 286, 315 (1904).

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[41] In complete context, after referring to the Framers' necessary understanding of the possibility "that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine [controversies between the United States and some of the States] according to the recognized principles of law" (143 U.S. at 644-45), the Court reasoned (*id.* at 646):

> The question as to the suability of one government by another government rests upon wholly different grounds [than a suit by an individual]. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the states. The submission to judicial solution of controversies arising between these two governments, 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other' (*M'Culloch v. Maryland* . . .), but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. . . . The exercise, therefore, by this court, of such original jurisdiction [in State/State and United States/State boundary disputes] . . . so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other states.

Eight years later the Court, in *Smith v. Reeves*, 178 U.S. 436 (1900) (also authored by Justice Harlan), made it clear that a federal corporation chartered by Congress (there, the receivers of the Atlantic & Pacific Railroad Company) falls on the "individual" side of the line: "It could never have been intended to exclude from Federal judicial power [federal-question] suits . . . when brought against a state by private individuals or state corporations, and at the same time extend such power to suits of a like character brought by Federal corporations against a state without its consent." *Id.* at 449. (Federal corporations generally have been treated like private corporations in sovereign-immunity analysis, unless Congress has affirmatively provided otherwise. *See, e.g., Franchise Tax Board v. United States Postal Service*, 467 U.S. 512 (1984), and cases there cited and discussed.)

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934), provides the sole exception to the rule that the Eleventh Amendment bars only suits by individuals. In that case, the Court held that the Amendment barred a foreign country from suing a state. Chief Justice Hughes' opinion recognized that the holding did not result from the language of the Amendment, but, he wrote, "Behind the words of the constitutional provisions are postulates which limit and control." 292 U.S. at 322. An examination of what was at issue in *Monaco* shows that the factors that produced the result (the "postulates which limit and control") do not apply to suits by Indian tribes.

Monaco was brought in 1933 to enforce bonds issued by the State of Mississippi in 1833 and 1838. The bonds fell due in the years immediately preceding and following the Civil War, and had never been paid off. They had been kept in the bondholders' families for the century or near-century since their issue, and the more than half-century since their default. The families finally donated them to the Principality of Monaco in the hope that the Principality might be able to circumvent the Eleventh Amendment bar applicable to individuals. To the Court, this was a familiar kind of case.

The expansive reading of the Eleventh Amendment to apply beyond its terms originated in a series of suits brought to enforce bonds, such as these, on which the Southern states defaulted after the Civil War.[42] The Court in these cases resolutely set its face against suits on these bonds, and relied on the Eleventh Amendment to bar them. Prior to these cases, it was unclear whether the Amendment barred suits brought by out-of-state citizens, or whether it merely failed to authorize party-based jurisdiction in suits

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[42] *See, e.g., Louisiana v. Jumel*, 107 U.S. 711 (1882); *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446 (1883); *The Virginia Coupon Cases*, 114 U.S. 269 (1885); *In re Ayers*, 123 U.S. 443 (1887). J. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987).

brought by out-of-state citizens.[43] In *Louisiana v. Jumel*, 107 U.S. 711 (1882), the Court held that the Amendment was a bar to bondholder suits by out-of-state citizens. In *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), a year later, the Court held that a state could not bring suit on behalf of individual bondholders.[44] Finally, in *Hans v. Louisiana*, the Court held in 1890 that bondholder suits brought by in-state citizens were also barred, although by the principle behind the Amendment rather than its text. *Monaco* was the last in this series of cases, decided more than 40 years after *Hans*.

In *Monaco* the Court held that the assignment of state-issued bonds to a foreign country could not create a right superior to that of the original bondholders: "We conclude that the Principality of Monaco . . . is in no better case than the donors of the bonds. . . ." 292 U.S. at 332. In part, the case stands for the simple proposition that the bar of the Amendment cannot be evaded by legal trick or subterfuge.[45] The Court will look behind the form of the suit to the substance of what is sought to be achieved.

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[42] *See, e.g.*, Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1078-1091 (1983); Gibbons *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1941-2003 (1983).

[43] The Court eventually held that a state could bring a suit on its own behalf for recovery on defaulted bonds. *South Dakota v. North Carolina*, *supra*. The ability of states to bring suit as assignees of the state-issued bonds was based on the explicit grant of jurisdiction in Article III (§2, cl.7) over suits between states. Further, the desire for mutual accommodation and cooperation among the states greatly reduces the threat posed by the possibility of such suits, and differentiates them sharply from suits brought by foreign countries with no such constraints derived from domestic political considerations and sympathies.

[44] In a similar situation, the Court in *South Dakota v. North Carolina*, *supra*, had allowed this artifice for circumventing the *Hans* ruling for state bonds "given" to a state, despite a strong four-Justice dissent contending that the original bond-holders were the real parties in interest and hence barred from suit by the *Hans* ruling. *See* 192 U.S. at 322-54 (White, J., dissenting). Even the *South Dakota* dissenters, however, agreed

But Chief Justice Hughes' opinion also relies on a deeper rationale applicable to all suits brought by foreign countries against states.[46] A foreign country "lies outside the structure of the Union," and cannot partake of any waiver of state sovereign immunity that "inheres in the acceptance of the constitutional plan." 292 U.S. at 330. Neither the states nor the United States are barred by the Amendment because they are sovereigns within the structure created by the document. But a foreign country is an external, rather than an internal, sovereign. If foreign countries could sue states directly, such suits would not be "limited to cases of alleged debts or of obligations issued by a State and claimed to have been acquired by transfer," and could "involve international questions in relation to which the United States has a sovereign prerogative." *Id.* at 330-331.[47] The Court therefore read the Eleventh Amendment to bar suits by a foreign country against a state, thereby forcing that foreign country to present its claim through the mediating body of the national government:

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that "the purpose of the amendment was to prohibit the enforcement of *individual* claims against the several states by means of the judicial power of the United States." *Id.* at 329 (emphasis added); *accord*, *id.* at 330-31, 337.

[45] As to suits by foreign states against states, the Court expressly rejected the assumption of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and implicitly the *dictum* in *United States v. Minnesota* (*see* note 34, *supra*), that the judicial power encompassed coercive suits by a foreign state against a state:

> *Cherokee Nation* rested upon the determination that the Cherokee Nation was not a "foreign State" in the sense in which the term is used in the Constitution. The question now before us necessarily remained an open one.

292 U.S. at 330.

[46] In *Welch*, the plurality, stating that "[t]he contours of state sovereign immunity are determined by the structure and requirements of the federal system," said that "[t]he rationale has been set out most completely" in Chief Justice Hughes' unanimous *Monaco* opinion. 483 U.S. at 487. The *Welch* opinion then lists the principal rationales of *Monaco*; as to the reason for barring suits by foreign states against states, *Welch* quotes only the interference-with-the-"sovereign prerogative"-of-the-United States rationale. *Id.*

> It cannot be supposed that it was the intention [of the Constitution] that a controversy growing out of the action of a State, which involves a matter of national concern and which is said to affect injuriously the interests of a foreign State . . . should be taken out of the sphere of international negotiations and adjustment through resort by the foreign State to a suit [directly against a state].

Id. at 331.

As will be elaborated in the next section, the considerations that led the Court to bar foreign countries under the Eleventh Amendment are totally inapplicable to Indian tribes.

3. An Indian tribe is not comparable to an individual nor to a foreign state, and a suit by a tribe against a state is not inconsistent with the structure and requirements of the federal system

Even were it correct (*but see* note 51, *infra*), as the State and its *amici* argue,[48] "that the framers of our Constitution had not the Indian tribes in view when they opened the courts of the Union to [specified controversies]," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831),[49] that argument avoids, rather than answers, the question of the relationship of Indian tribes to principles of sovereign immunity and federal structure that the Framers *did* have in mind. The Convention and the constitutional structure it

[48] Pet. Br. 11-15; Alabama Br. 10-11.

[49] At the same time, however, the point refutes the contention of the *amici* States about Congress' rejection of a proposed addition to the Eleventh Amendment that would have exempted from the Amendment's bar actions arising under treaties. Alabama Br. 13-14. Contrary to the suggestion that this proposal was aimed at actions arising under Indian treaties, its intent "almost certainly [was] in order to permit enforcement of state debts to foreign citizens." Fletcher, *supra* n.43, at 1059 n.120. Of particular concern were certain provisions of the Treaty of Paris of 1783 that might subject the states to liability to British creditors. *See Atascadero*, 473 U.S. at 264 n.15 (Brennan, J., dissenting). *See also Welch*, 483 U.S. at 485 n.18 (plurality opinion).

created undoubtedly acknowledged the retained sovereign status of the Indian tribes,[50] just as surely as it recognized the retained sovereignty of the states—although the sovereignty of both was diminished by and made subordinate to the national government. Whatever the Framers might have thought about the capacity of the tribes to resort to the judicial power,[51] as will be seen, tribal suits against

[50] In the Commerce Clause (Art. I, § 8, cl. 3), the Constitution recognizes, and confers upon Congress the power "[t]o regulate commerce" with respect to, three classes of sovereigns: "with foreign nations, among the several States,and with the Indian tribes." The separate status of the tribes is further expressed in the exclusion of "Indians not taxed" from the census upon which "Representatives and direct taxes shall be apportioned." Art. I, § 2, cl. 3. *See also* § 2 of the Fourteenth Amendment.

[51] Contrary to the assumption that the tribes' only course of redress was by "appeal . . . to the tomahawk, or to the government," *Cherokee Nation*, 30 U.S. (5 Pet.) at 18, when President Washington met in 1790 with Cornplanter, Chief of the Seneca Nation, the President assured the Chief that Seneca lands were securely protected from any state or person by the Non-Intercourse Act of 1790: "If . . . you have any just cause of complaint against [a purchaser of your lands] and can make satisfactory proof thereof, *the federal courts will be open to you for redress*, as to all other persons." *Quoted in Oneida II*, 470 U.S. at 237 n.8; *id.* at 255 (Stevens, J., dissenting) (emphasis added). The problem with this promise, and the one that confronted the Cherokees in 1831 when they sought peaceful judicial redress against Georgia's assertion of all her sovereign power to appropriate their lands and annihilate them, was that the federal courts were "open" only if the government initiated the action. Congress did not confer general federal-question jurisdiction on the lower federal courts until the Judiciary Act of 1875 (now 28 U.S.C. § 1331), by which statute " 'Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789,' " *Zuickler v. Koota*, 389 U.S. 241, 247 (1967), *quoting* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM, 65 (1927); and, until even later than that, individual tribal Indians were not citizens of the United States and consequently were deemed incapable of suing in the federal courts. *See, e.g., Felix v. Patrick*, 145 U.S. 317, 330-32 (1892). The capacity of the tribes to bring federal-question suits, however, seems never to have been doubted, needing only a grant of jurisdiction. *See, e.g., Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW

states do not come within the principles of sovereign immunity and federalism, as they conceived them, any more than do suits against states by the United States and sister states.

Manifestly, the proponents of retained state sovereign immunity and the adopters of the Eleventh Amendment "had not the Indian tribes in view." As is well-known to this Court, the Amendment was adopted in reaction to the Court's holding in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that a South Carolina citizen could bring an ordinary contract claim against the State of Georgia, relying only on the party-based grant of jurisdiction over suits between a state and an out-of-state citizen. *Edelman v. Jordan*, 415 U.S. at 662. The Amendment was passed quickly thereafter, in direct repudiation of that holding. *Id.*

During the last decade, there has been an enormous outpouring of academic literature on the history surrounding the adoption of the Amendment.[52] There has been some

284 (1942, Univ. of New Mexico reprint).

The only general federal-question jurisdiction extant in the federal courts prior to 1875 was this Court's appellate jurisdiction over state court judgments under section 25 of the Judiciary Act of 1789. That jurisdiction was exercised the very next term following *Cherokee Nation*, without mention of the Eleventh Amendment, to nullify the same Georgia laws which the Tribe had attempted to directly challenge by invoking the Court's original jurisdiction. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). (Despite its limitations on the Article III judicial power, the Amendment is no barrier to the exercise of this Court's federal-question appellate jurisdiction over cases against states arising in the state courts. *McKesson v. Florida Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990).)

[52] *See, e.g.*, Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978); Fletcher, *supra* n.43; Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Amar, *Of Sovereignty Federalism*, 96 YALE L. J. 1425 (1987); Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1 (1988); L. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); W. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV.

difference of opinion among those who have addressed the Amendment's original meaning,[53] but there has never been so much as a hint in any of this literature that the ability of the Indian tribes to sue the states was contemplated by the adopters. They were concerned with the ability of private individuals, both foreign and domestic, to sue the states on domestic debts, and the ability of British subjects to recover obligations of the states under the Treaty of Paris between the United States and Great Britain.[54] There is not a shred of evidence that the ability of the Indian tribes to sue the states was even remotely in view.[55]

1372 (1989); *Massey, State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989); Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); Massey, W. Marshall, L. Marshall, and Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 117 (1990).

[53] *See* L. Marshall, *supra*; W. Marshall, *supra*; Massey, *supra*; Fletcher, *The Diversity Explanation*, *supra*.

[54] *See, e.g.*, Gibbons, *supra* n.52, at 1895-1940; L. Marshall, *supra* n.52, at 1356-1371.

[55] It is beyond the necessary scope of our argument, but we agree with the historical conclusion reached by Justices Brennan, Blackmun, Marshall and Stevens in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J. dissenting), that the "diversity explanation" of the Eleventh Amendment is the best understanding of the original intent of the adopters of the Amendment. Professors Amar, Field, Fletcher, Gibbons, and Jackson, whose articles are cited above, have written extensively in support of this view based on their own research. For additional comments on the diversity explanation, *see* Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment after* Pennhurst v. Halderman, 12 HAST. CONST. L. O. 643, 652 (1985) ("persuasively developed" view); Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1599 n.103 (1990) ("persuasive" explanation); Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 68 ("fully persuasive"); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 175 n.8 (2d ed. 1988) ("a powerful argument"). *See also* Easley, *The Supreme Court and the Eleventh Amendment: Mourning the Lost Opportunity to Synthesize Conflicting Precedents*, 64 DENV. U. L. REV. 485, 488 (1988) ("conclusion makes sense"); Harris & Kenny, *Eleventh Amendment Jurisprudence after* Atascadero, 37 EMORY L. J. 645, 654 (1988) ("persuasive" and "cogent"); Werhan, Pullman *Abstention after* Pennhurst: *A Comment on Judicial Federalism*, 27 WM.

It is not contended that an Indian tribe is a citizen of the State within which it is found, nor that it is a governmental unit of such a state.[56] And *Cherokee Nation* itself held that a tribe is not a foreign state within the meaning of the Constitution. But although not foreign, the tribes *were* deemed to be "states" in the sense of being self-governing bodies politic.[57] They were (and are) "domestic dependent nations," legally distinct from both the states and the United States, 30 U.S. (5 Pet.) at 17,[58] constituting

& MARY L. REV. 449, 460 n.46 (1986) ("a more sophisticated reading of the Eleventh Amendment").

[56] Just as "[a] state is not a citizen," *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894) (*see also Moor v. County of Alameda*, 411 U.S. 693, 717 (1973)), so also a tribe is not a citizen of any state, nor a citizen or subject of any foreign state. *See, e.g.*, C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2d § 3622 (1984) (a tribe is not a citizen of a state for purposes of federal citizen or alien diversity jurisdiction); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 372 (1942, Univ. of New Mexico reprint). And a tribe is not a part of either the state or federal government systems. *See, e.g., United States v. Barquin*, 799 F.2d 619 (10th Cir. 1986) (Indian tribe not a "local government agency").

[57] Chief Justice Marshall held: "So much of the argument [of the Tribe] as was intended to prove the character of the Cherokees as a State, as a distinct political society separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a State from the settlement of our country. . . . The acts of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts." 30 U.S. (5 Pet.) at 16. But, though "[t]he party defendant [the State of Georgia] may . . . unquestionably be sued in this court" (*id.* at 15-16), the Court concluded that the tribe was not a *foreign* state within Article III's grant of original jurisdiction, and hence not entitled to invoke the judicial power against a state, as it was then assumed a foreign state would be empowered to do.

[58] *See also, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (tribes viewed "as distinct, independent political communities, retaining their original natural rights"; "a people distinct from others"); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973), *quoting United States v. Kagama*, 118 U.S. 375, 381-82 (1886) ("not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union

"this third source of sovereignty in the United States."[59] While the Framers may have contemplated that the Indian

or of the State within whose limits they resided"); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("unique aggregations possessing attributes of sovereignty over both their members and their territory"; "a good deal more than 'private, voluntary organizations' "); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("[a]s separate sovereigns pre-existing the Constitution"); *Duro v. Reina*, 110 S. Ct. 2053, 2060 (1990) ("limited sovereigns, necessarily subject to the overriding authority of the United States, yet retaining necessary powers of internal self-governance"). The nature of their legal status is well illustrated by *United States v. Wheeler*, 435 U.S. 313 (1978), in which the Court held that the Double Jeopardy Clause does not bar a federal felony prosecution of a person who has been previously convicted in a tribal court of a lesser included offense arising out of the same incident. The Court rested its decision on the doctrine that prosecutions by separate sovereigns for the same act do not constitute double jeopardy. Under this "dual sovereignty" doctrine, an offense against a tribe is deemed to be an offense against a sovereign separate and distinct from the United States.

Petitioner and *amici* place emphasis on the analogy of the relationship between the tribes and the United States to "that of a ward to his guardian." *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. But that analogy merely references the so-called "plenary power" of the federal government over the tribes, and its primary operation is to impose a trust responsibility upon the government; it does not undermine the retained sovereign status of the tribes which the government has not only refrained from extinguishing, but explicitly perpetuates by affirmative national policy.

[59] C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 103-04 (1987). It is often recognized that in some respects tribes "have a status higher than states," *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959), or that they "occupy a sovereign status somewhat comparable to that of the States." *Oneida Indian Nation v. New York*, 520 F. Supp. 1278, 1306 (N.D.N.Y. 1981), *aff'd in part, vacated on other grounds*, 691 F.2d 1070 (2d Cir. 1982). Indeed, in a number of important respects Indian tribes enjoy immunities from state authority that are greater than the immunities of the United States and its officers from comparable forms of state action. *See* C. WILKINSON, *supra*, at 98 & nn. 65-69 (1987). Tribes "exercise local sovereignty in much the same way that states do outside of Indian country," *id.* at 116, as demonstrated by the Court's recent decisions in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), emphasizing the separate, independent status of tribal laws and courts.

tribes would eventually disappear or become assimilated,[60] the structure they adopted did not call for that end, and it is now accepted that the Indian tribes "are entitled to take their place as independent qualified members of the modern body politic."[61]

Thus, unlike private suits, a suit by an Indian tribe against a state falls squarely within the concept of "the suability of one government by another government." Consequently, to adopt the reasoning of *United States v. Texas*, 143 U.S. at 646, the exercise of judicial power over "controversies arising between these two governments [tribes and states], 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other' . . . , but both subject to the supreme law of the land [or the supreme power of Congress, in the case of the tribes], does no violence to the inherent nature of sovereignty." This tripartite scheme of divided sovereignty, in which the tribes continue to play a vital role as independent *governments* "dependent on, and subordinate to, only the Federal Government, not the States,"[62] plainly was contemplated by the Framers—indeed, it was created by them.[63] A suit by a tribe against a state, therefore, does

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[60] *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) at 593-94 (McLean, J., concurring).

[61] *Arizona v. California*, 460 U.S. 605, 615 (1983), *quoting Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968), *quoting Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).

[62] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

[63] The State's suggestion that the Indian Commerce Clause of the Constitution was of no moment, because it involved no real diminution of state sovereignty beyond that which had already been given up in the Articles of Confederation (Pet. Br. 15-16 & n.20), cannot be credited. Paragraph 4 of article 9 of the Articles (quoted by the State) had conditioned congressional power over Indian trade and affairs with the significant proviso "*that the legislative right of any State within its own limits be not infringed or violated*" (emphasis added). Legislative power, of course, is the essence of sovereignty, and the quoted proviso appears to have retained that sovereign right over Indian relations in the states.

not fall within the essential understanding of the principles of sovereign immunity as forbidding suits by individuals.

Further, the factors that led this Court in *Monaco* to find an Eleventh Amendment bar against suits by foreign countries do not apply to suits by Indian tribes. Suits brought by an Indian tribe are not likely to replicate the sort of suit in *Monaco*, in which the Principality was no more than a mere assignee of a private right. They will instead be suits, such as the one now before the Court, in which the tribe asserts an injury that affects it in its sovereign or governmental capacity. More basically, Indian tribes are sovereignties internal, rather than external, to the United States. Suits by Indian tribes do not implicate foreign relations and sensitive questions of foreign policy and negotiations.

Finally, and perhaps most important, Indian tribes have a special trust relationship to the national government, and the claims of the Indian tribal sovereigns are subject to mediation through that government. The United States government has the power, entirely independent of the Eleventh Amendment, to limit or even eliminate the power of Indian tribes to sue the states directly. Congress has not exercised that limiting power, however; it has done quite the opposite, authorizing Indian tribes to bring suits against the states. *See, infra*. But the existence of that power is a compelling reason to see Indian tribal sovereigns as fundamentally unlike foreign sovereigns. Indian tribes are do-

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In fact, this and other "ambiguous phrases" in the Articles of Confederation "were so construed by the States of North Carolina and Georgia as to annul the [grant of congressional Indian-affairs] power itself." *Worcester*, 31 U.S. (6 Pet.) at 559. Thus, upon adoption of the Constitution, the states surrendered their retained legislative (and all other) sovereignty over Indian matters, which was thereby "committed exclusively to the government of the Union." *Id.* at 561. *See also, e.g., Oneida II*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law"). It may be that this surrender received "virtually no attention" from the Framers (Pet. Br. at 15), but undeniably "[i]t is one of the powers parted with by the States and vested in the federal government." *Worcester*, at 594 (McLean, J., concurring).

mestic sovereigns, existing inside "the structure of the Union," and should be understood to have the right to bring suit against a state comparable to the right enjoyed by the other domestic sovereigns.

As with suits against states by the United States and their sister states, federal-question suits by Indian tribes are "inherent in the plan of the Union" (*Monaco*, 292 U.S. at 330) and "essential to the peace of the Union" (*id.* at 328). "While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan." *Id.* at 329.[64]

C. Alternatively, Federal-Question Suits By Indian Tribes Against States Are Authorized By 28 U.S.C. § 1362, And State Sovereign Immunity Is No Bar

If the Court decides, that without move, the Eleventh Amendment does apply to federal-question suits by Indian tribes, it remains to be determined whether Congress has nonetheless authorized such suits. This question can only be understood in the context of the United States' unquestioned power to sue the states on behalf of the Indian tribes. *United States v. Minnesota*, 270 U.S. 181 (1926). One way to state the question is to ask whether Congress has statutorily abrogated the states' sovereign immunity to suits by Indian tribes. But a more accurate way is to ask whether

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[64] Petitioner argues that it would somehow be "unfair" if the Eleventh Amendment were held to be inapplicable to suits by tribes against states, yet, because of the unique nature of their retained sovereignty, the tribes would continue to enjoy immunity from suits brought against them be the states. Pet. Br. 21 n.25; The alleged unfairness, if there is any, occured two centries ago with the states' surrender of their sovereignty over Indian matters in the plan of the convention, and (to adapt the Court's statement from a similar context) simply "is a necessary consequence of [the tribes'] role in a system of [treble] sovereignties." *Welch*, 483 U.S. at 488 (plurality opinion). That the tribes are not obliged to surrender their sovereign immunity just because the states have none to relinquish when sued by tribes, is the natural result of a federal structure in which the United States as trustee for Indians may sue the states, *United States v. Minnesota*, 270 U.S. 181 (1926), but at the same time the states may not sue the United States in its capacity as trustee for Indians. *Minnesota v. United States*, 305 U.S. 382 (1938).

Congress has delegated to the tribes themselves the power that the United States has always had to sue on the tribes' behalf. The question is thus not whether the states' immunity has been overridden by Congress, but rather whether the Indian tribes have been authorized by Congress to exercise in a different form a power that is conceded already to exist.

In *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1975), the Court unanimously construed 28 U.S.C. § 1362[65] as authorizing Indian tribes to bring federal-question suits against states by name in the federal courts.[66] In particular, the Court held that the "broad jurisdictional barrier" of the Tax Injunction Act (*id.* at 470) did not preclude the exercise of jurisdiction over the Tribe's claims for declaratory and injunctive relief against a state's collection of sales and personal property taxes. *Id.* at 474-475.

The Tax Injunction Act (28 U.S.C. § 1341), and "the pre-existing federal equity practice" which it incorporates (*id.* at 470), "reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 103 (1981).[67] Nonetheless, the Court

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[65] Quoted in n.13, *supra*.

[66] The named defendants in the consolidated cases reviewed in *Moe* were the State of Montana, the State's Department of Revenue and its director, and various county sheriffs. 425 U.S. at 467 n.4 and 468 n.7. Even though the Court dealt only with the Tribe's claims for declaratory and injunctive relief (and not the claims of individual tribal members for tax refunds), *id.* at 468 n.7, under the doctrine of the Eleventh Amendment, if applicable, naming a state and one of its departments or agencies as parties defendant is absolutely prohibited, and "[t]his bar exists whether the relief sought is legal or equitable." *Papasan v. Allain*, 478 U.S. at 276; *accord, e.g., Pennhurst*, 465 U.S. at 100; *Florida Dept. of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (*per curiam*); *Alabama v. Pugh*, 438 U.S. 781 (1981) (*per curiam*).

[67] Prior to the enactment of § 1341, the Court had adopted the "principle of comity" and applied it to foreclose actions "brought to enjoin the collection of a state tax in the courts of a different, though paramount

in *Moe*, relying on the legislative history of § 1362,[68] held that Congress had set aside these powerful federalism con-

[federal] sovereignty." *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). The principle is based on "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations . . . ." *Id.*

[68] *See* H.R. REP. No. 2040, 89th Cong., 2d Sess. 2-3 (1966), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3147. In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559 (1983), in which states had been sued by tribes (as well as separately by the United States) in federal court, the Court, relying on § 1362 as the basis of jurisdiction over the tribes' claims, held that it was "clear" that "the federal courts had jurisdiction here to hear the suits brought both by the United States and the Indian Tribes." The Court said (*id.* at 559-60 n.10):

> Congress contemplated that § 1362 would be used particularly in situations in which the United States suffered from a conflict of interest or was otherwise unable or unwilling to bring suit as trustee for the Indians, and its passage reflected a congressional policy against relegating Indians to state court when an identical suit brought on their behalf by the United States could have been heard in federal court.

The legislative history of the statute cites *Yoder v. Assiniboine & Sioux Tribes of Fort Peck Indian Reservation*, 339 F.2d 360 (9th Cir. 1964), as "exemplif[ying] the difficulties encountered by Indian tribes" which would be overcome by the enactment of § 1362. H.R. REP. No. 2040, *supra*, at 3. (*Yoder* was an action by the Tribe against the Montana Oil and Gas Commission seeking to enjoin state regulation of tribal lands; the Ninth Circuit dismissed the case because of failure adequately to establish the $10,000 "amount in controversy" requirement of the general federal-question jurisdictional statute (28 U.S.C. § 1331) as it then read.) The House Report (at p. 3) stated that "[t]he judicial determination of controversies concerning such lands commonly is committed to the Federal courts," citing *Minnesota v. United States*, 305 U.S. 382 (1938). (The later case, in turn, was an action brought by the State against the United States in State court to condemn individual Indian allotments for a highway right of way; the case was removed to federal court. On review, this Court affirmed a judgment dismissing the case, holding that the United States, in its capacity as trustee for the Indians, was immune from suit in a state court, absent the consent of Congress. The Court noted that jurisdiction over such controversies "has been commonly committed exclusively to federal courts." *Id.* at 389.) It is thus plain beyond peradventure that Congress understood that the jurisdiction § 1362 conferred upon suits by Indian tribes would involve litigation brought by

cerns in favor of access by Indian tribes to federal judicial relief from state taxing schemes. The Court reasoned that Congress intended to confer upon the tribes a power to bring federal-question suits against states in federal court that "would be at least in some respects as broad as that of the United States suing as the tribe's trustee." 425 U.S. at 473; *id.* at 474 (legislative history "suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf").[69] And since the Tax Injunction Act would not have operated against the United States had it sued on the Tribe's behalf,[70] the Tribe's suit likewise was not barred. *Id.* at 474-475.

Although *Moe* did not involve an Eleventh Amendment defense, it construed § 1362 as overriding a jurisdictional limitation reflecting the same fundamental considerations of federalism as those which animate the doctrine of state sovereign immunity. Equally important, *Moe* construed the statute as authorizing Indian tribes to bring federal-question actions against the states *qua* states to the same extent as the United States suing in their behalf. Since the United States can sue a state on behalf of an Indian tribe without regard to the Eleventh Amendment, *United States v. Minnesota*, *supra*, 270 U.S. at 195 (*citing United States v. Texas*,

[illegible] suits against states, if nothing else, as the only two cases cited in the Committee reports involved litigation in which states were parties opposed to Indian interests.

[69] The obvious "respects" in which § 1362 does not confer jurisdiction over tribal suits are those in which no federal question is raised. *See, e.g., Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980) (no § 1362 federal-question jurisdiction over a tribe's state-law breach-of-contract claim, even though the United States could have brought the suit on the tribe's behalf pursuant to 25 U.S.C. § 175), *cert. denied*, 451 U.S. 911 (1981).

[70] The Court cited *Department of Employment v. United States*, 385 U.S. 355 (1966), in which the Court held not only that the Tax Injunction Act did not restrict a suit against a state, but also expressly rejected the State's contention in that case "that the State of Colorado has not consented to suit in a federal forum even where the plaintiff is the United States." *Id.* at 358.

supra), just as the United States can sue a state without regard to the Tax Injunction Act, it follows that the Amendment should not bar a tribe suing in its own behalf.[71]

Petitioner and *amici* argue, however, that this result is forbidden by the "clear statement" rule of the Court's recent decisions, which require that "evidence of congressional intent [to supplant state immunity] must be both unequivocal and textual." *Dellmuth*, 109 S. Ct. at 2401. The argument should be rejected because the Court's construction of the statute as authorizing suits by tribes against states satisfies the "clear statement" rule, or because the rule is inapplicable, or because neither the rule nor its parent (the Eleventh Amendment) is applicable to a congressional delegation to tribes of the United States' trust authority to sue states.

1. The intent of the statute to subject states to suit by Indian tribes satisfies the clear-statement rule

This Court unanimously construed § 1362 in *Moe* as authorizing Indian tribes to bring federal-question suits against states *eo nomine* to restrain the collection of state taxes. The Court then held that § 1362 displaces the important jurisdictional policy of the Tax Injunction Act, which reflects paramount considerations of federalism comparable to those said to underlie the Eleventh Amendment. In the intervening fourteen years between the decision in *Moe* and the decision of the Ninth Circuit below, at least eight lower federal courts have ruled, on the basis of *Moe*'s reasoning,

[71] Petitioner does not contend that the United States, in furtherance of the federal policy of tribal self-government and self-determination, could not have brought this action on behalf of respondent tribes, to secure their treatment by the State as federally recognized Indian tribes rather than as "racially exclusive groups," and we think it clear that the government could have brought the suit. *See Moe*, 425 U.S. at 473-74 & n.13. We therefore take no position on § 1362's effect on state sovereign immunity in a tribal suit in which the United States would not have standing to sue as tribal trustee.

that § 1362 overcomes the Eleventh Amendment defense of the states.[72] During this period, Congress has not seen fit to amend § 1362, or to express in any way its disapproval of either *Moe* or the lower court decisions applying its rationale to the Eleventh Amendment.

The statute authorizes tribal suits against states to enjoin the states from collecting taxes for the general treasury, and no ground has been advanced that would justify the Court in revisiting *Moe*. *See, e.g., Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning"). Under these circumstances the "clear statement" rule is satisfied by the statutory authorization of § 1362 to sue a state. As there is no requirement that Congress mention either the Eleventh Amendment or state sovereign immunity in the statute,[73] the purpose of the "clear statement" rule is surely fulfilled by congressional

[72] *See Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079-80 (2d Cir. 1982); *Red Lake Band of Chippewas v. City of Baudette*, 730 F. Supp. 972 (D. Minn. 1990); *Navajo Nation v. New Mexico*, 14 Indian L. Rep. 3047 (D.N.M. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 595 F. Supp. 1077 (W.D. Wis. 1984); *Marty Indian School v. South Dakota*, 592 F. Supp. 1236, 1237 (D.S.D. 1984); *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1307 (N.D.N.Y. 1983); *Charrier v. Bell*, 547 F. Supp. 580, 585 (M.D. La. 1982); *Confederated Tribes of the Colville Indian Reservation v. Washington*, 446 F. Supp. 1339, 1134-50 (E.D. Wash. 1978) (three-judge court), *rev'd in part on other grounds*, 447 U.S. 134 (1980); *Native Village of Tyonek v. Puckett*, No. A82-369 Civil, op. tr. at 17 n.17 (D. Alaska 3 Dec. 1986) (*dictum*), *aff'd in part, rev'd in part on other grounds*, 890 F.2d 1054 (9th Cir. 1989), *cert. pending*, No. 89-609; *Aguilar v. Kleppe*, 424 F. Supp. 433 (D. Alaska 1976) (*dictum*). *See also* the Annotation on point at 65 ALR Fed. 649 (1983). *Cf., Lac Courte Oreilles Band v. Wisconsin*, No. 74-C-313-C (W.D. Wis. Oct. 11, 1990) (decided after this Court's grant of review in this case).

[73] *See Pennsylvania v. Union Gas Co.*, 109 S. Ct. at 2277-80 (plurality opinion); *id.* at 2295-96 (Scalia, J., concurring in relevant part); *Dellmuth*, 109 S. Ct. at 2403 (Scalia, J., concurring); *cf. Port Authority Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868, 1873 (1990).

authorization of federal-court actions to prevent the collection of state taxes—"the life-blood of government"[74]—a remedy that impacts the state treasury much more dramatically than an award of money damages. *See, e.g., McKesson v. Florida Div. of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990).

2. The clear-statement rule is inapplicable in light of the "contemporary legal context" of § 1362's enactment

When § 1362 was enacted in 1966, this Court's 1964 decision in *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), controlled the question of what statutory language was required for Congress to override a state's Eleventh Amendment immunity. In *Parden* the Court found intent to authorize suits against states in language no more specific than words broadly subjecting "every common carrier by railroad" to suit in federal court. The Court specifically declined to adopt the clear-statement rule advocated by Justice White's four-justice dissent. *Id.* at 198-200. *Parden* was recently overruled on this point by *Welch*, 483 U.S. at 478 (1987), but such was not the law in 1966 when Congress enacted § 1362.

Where, as here, the Court has adopted a new rule of statutory construction, it has also taken into account the presumption that Congress would have relied upon the old rule as a guide to its contemporary choice of statutory language. The Court has accordingly paid Congress the deference of "tak[ing] into account [the] contemporary legal context" in which Congress acted prior to the change in ground rules.[75]

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[74] *Bull v. United States*, 295 U.S. 247, 259-60 (1935).

[75] *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1982); *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381 (1982). Those two cases required the Court to decide whether to imply private causes of action from statutory schemes that were silent on the subject. The statutes in question were enacted prior to *Cort v. Ash*, 422 U.S. 66 (1975), in which the Court had broken from precedent and charted a new and more exacting course, calling for Congress to be explicit in the creation of private remedies. In both *Cannon* and *Curran*, however, the Court implied causes of action under the pre-*Cort* precedents, in deference to the "contemporary legal context" in which Congress had acted.

The Court touched on this issue in *Dellmuth*, 109 S. Ct. at 2401, in which it addressed the dissent's criticism of applying the "clear language" rule to a statute enacted in 1975. The Court did not reject the validity of the contemporaneous-legal-context principle, but emphasized that the enacting Congress in 1975, "taking careful stock of the state of Eleventh Amendment law," would know that it had to do more than "drop coy hints" that it intended to abrogate the states' Eleventh Amendment immunity. 109 S. Ct. at 2401.[76] The 1966 Congress, on the other hand, had nothing to take stock of on this question except the 1964 decision in *Parden*. Under that standard, the language of § 1362, in the context of Congress' plenary and exclusive authority over the subject, would clearly suffice to encompass suits against states and demonstrate congressional intent to authorize such suits.

Congress certainly knew that, historically, tribes had been forced to turn to the federal courts for protection, and more often protection from state action than from private action. The only two cases cited in the legislative history of § 1362 involved litigation with states, and Congress knew that state-tribal issues arising under federal law were among, and probably formed the majority of, the types of suit the tribes would bring under the new section. *See* note 68, *supra*. The traditional distrust of states and state courts was also a factor in enacting the statute: the tribes were not to be relegated to bringing their claims in state courts.[77]

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[76] In obvious tension with *Parden*, the Court in *Employees v. Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973), had foreshadowed the clear-statement rule by requiring Congress to "indicat[e] in some way that the constitutional immunity was swept away."

[77] *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559-60 n.10 (1983). "There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated." S. REP. No. 1507, 89th Cong., 2d Sess. 3 (1966). "[T]he Department of

In this context, an older rule of statutory construction—one grounded in equally long-standing and honor-bound principles—is applicable: Indian legislation is to be interpreted to favor the establishing of Indian rights and resolving ambiguities in favor of the Indians.[78] In these special circumstances of § 1362's enactment and purpose, the "clear statement" rule should be deemed inapplicable.

3. Neither the Eleventh Amendment nor its "clear statement" rule are applicable to § 1362's delegation to Indian tribes of the trust authority of the United States to sue states on behalf of tribes.

The rationale for Eleventh Amendment immunity and its "clear statement" rule—that denial of state sovereign immunity upsets the fundamental constitutional balance between the federal government and the states—is simply lacking here. The State is not exposed under § 1362 to claims from which it would otherwise enjoy immunity, or even expect not to be sued, because such suits can be and often have been brought by the United States to fulfill its role as trustee. In this truly "sui generis" constitutional field of Indian affairs (Pet. App. B19), there is no basis for imposing special restrictive drafting rules on Congress with respect to authorizing tribes to sue states, nor even a basis for presuming the existence of state immunity. The United States, pursuant to its judicially created trust obligations, may invoke the federal judicial power against states on

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the Interior indicated that a tribe's desire to have a Federal forum for matters based upon Federal questions is justified." H.R. REP. No. 2040, 89th Cong., 2d Sess. 3 (1966), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3146. "The issues involved are Federal issues and the tribes should not be required to conduct the litigation in the State courts." Dec. 22, 1965 letter from Ass't Sec. of Interior Harry R. Anderson to Sen. Eastland, included in H.R. REP. No. 2040, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3148 (referring to tribal lands cases).

[78] *See, e.g., Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 149 (1984); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

behalf of tribes on the basis of nothing more than the general jurisdictional grant of 28 U.S.C. § 1345.[79] The states undeniably ceded that power. It necessarily follows that they relinquished to Congress the power to delegate that litigation authority to the tribes. The states retained no right, sovereign or otherwise, to object to Congress' determination of the manner in which its trust obligations will be fulfilled.

As *amici* Council of State Governments, et al., have suggested the question:

> [Given the states' surrender to national legislative power of all sovereignty over Indian affairs and relations, is it not] arguably a matter of far less consequence whether such law is to be enforced through suit by the United States; by the United States "*ex rel.*" a tribe or individual; or directly by an individual or tribe in its own name pursuant to congressional authorization?

State Governments Br. 13. *Amici*, of course, say that having conceded so much power to the national legislature, they have the right in return to insist upon a clear-statement rule. But the fulcrum which the Constitution set in place with respect to Indian relations, as in no other field of national endeavor, established a different balance.

The allocation of power made by the Constitution in this field leaves so little room for state authority that this Court could say to Kansas in 1867, for example, that federally recognized Indian tribes are

> to be governed exclusively by the government of the Union. If under the control of Congress from necessity, there can be no divided authority .... There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on

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[79] "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States. . . ."

> condition that the Indian rights would remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union.

The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-56 (1867). A more complete defeasance of state sovereignty is hard to imagine.

The uniqueness of the constitutional scheme of tribal relations, however, is not the exclusion of state authority alone. It is a combination, rather, of that diminution of state sovereignty, the acknowledgment of the tribes as the third source of sovereignty under the constitutional plan, *and* the trust relationship between the sovereign tribes and the superior sovereign Union grounded in honor and morality, and enforced by law. The United States has no trust or other duty to sue one sovereign state on behalf of another, but it does have such an obligation to sue a state on behalf of an injured tribe. The power and its exercise are undisputed. The states are not heard to complain when Justice Department lawyers initiate litigation against them on behalf of tribes, nor do the states have standing to object when the government contracts such legal representation out to private lawyers.[80]

If the constitutional balance is not upset in those circumstances, it cannot be upset when Congress authorizes the

[80] The Justice Department is not infrequently conflicted out or for policy reasons declines to litigate on the tribes' behalf. *See* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STANFORD L. REV. 1213 (1975). In these instances the BIA, in the exercise of its trust responsibility, grants tribes hundreds of thousands of dollars annually to hire private attorneys to prosecute cases which the government for various reasons has declined to bring. *See* BIA regulations authorizing government payment of the fees of tribal attorneys when "the Attorney General refuses assistance or advises that assistance is not otherwise available," 25 C.F.R. § 89.41(a); "the Solicitor is unable to provide representation due to a conflict of interest or other reasons," *id.* at (b); "the Solicitor . . . determine[s] that the services of his office are not available." *Id.* at (c).

tribes to bring such suits on their own initiative. Because of the tribes' sovereign status and the fiduciary relationship between them and the government, Congress may, without disrupting the federal/state balance, delegate its *legislative* power to the tribes as to subjects over which the tribes possess retained sovereign authority. *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975). May Congress not similarly delegate to the tribes the United States' trust-based *litigation* authority to sue states, also without disturbing the constitutional balance *vis-a-vis* the states?

The Court implicitly resolved this issue in *Arizona v. California*, 460 U.S. 605 (1983), in which tribes were allowed to intervene as plaintiffs in an original action brought in this Court against states by the United States. Although the tribes were seeking more expansive relief than the United States was seeking on their behalf (*see id.* at 626), the Court rejected the states' Eleventh Amendment objections to intervention by the tribes. The Court held that "our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Id.* at 614.[81]

All Congress has done in § 1362 is to delegate to the tribes the power to bring their own suits rather than require their continued reliance on the vicissitudes of the United States' trust responsibility. That action has no discernible impact on the federal structure, and signifies no change in the federal/state relationship, because the states surrendered the power completely and exclusively in the plan of the Convention. Recognition that in § 1362 Congress has authorized tribal suits against states leaves the doctrine of Eleventh Amendment immunity and its corollary "clear statement" rule entirely intact. The Court would be recon-

[81] In support of that disposition, the Court cited *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981), which holds that in original actions the Eleventh Amendment is no bar to suits between sister states, unless "the plaintiff State is actually suing to recover for injuries to specific individuals."

firming only what *Moe* held: that Congress enacted a statute that, properly interpreted in light of the long history of relations between Indian tribes and the federal government, and with due regard for the structure and requirements of the federal system, entitles the tribes to have tribal/state disputes resolved in the federal courts.

CONCLUSION

For all of the reasons set forth above, the judgment below should be affirmed.

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RESPECTFULLY SUBMITTED,

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